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Myrlene Lytle v. Clinton Ezra Lytle : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MYRLENE LYTLE, Plaintiff/Appellee, v. CLINTON EZRA LYTLE, Defendant/Appellant.	Appellate No. 970358-CA

Argument Priority No. 15

REPLY BRIEF OF APPELLANT

Appeal from the Judgment and Orders of the District Court of the Fifth Judicial District, the Honorable James L. Shumate, Presiding.

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I. STANDARD OF REVIEW

Defendant's brief defines the correct issue and standard for review in regards to the first question presented for appeal. The additional findings were presented to the trial court in the plaintiff's response to defendant's Rule 52 motion, and, as shown below, the trial court has no authority to enter additional findings after judgment is entered by the court.

In regards to the third issue presented for review, Plaintiff's suggested formulation is too restrictive, as it ignores the other three findings which the court cited to as justifying the award of an inequitable share of the marital estate to the plaintiff. If those other factors are included, either of the parties formulation of issue 3 are adequate.

In regards to the fifth issue, plaintiff has included unnecessary factual information in his formulation. The question is whether the ranch was under the jurisdiction of the court and whether the ranch should have been included in the court's distribution of assets. The court clearly made the award and factored it into its calculations regarding the distribution of other assets. As conceded by the plaintiff, the defendant did not have good title to the property at the time of the divorce. Plaintiff's Brief at 12.

In deciding whether the trial court had jurisdiction over the ranch, determining whether property can properly be included in the estate is a matter of law and is reviewed for correctness. See

Endrody v. Endrody, 914 P.2d 1166, 1168 (Utah App. 1996). Only after the marital assets are determined is the trial court's property division reviewed under an abuse of discretion standard. Endrody, 914 P.2d at 1168-9.

II. FACTUAL INACCURACIES

Plaintiff in her brief attempts to introduce several issues as to which the trial court either did not find or made no finding. The Plaintiff attempts to introduce the notion of fault, as she did at trial, by referring to the defendant's future wife as his "girlfriend." See Plaintiff's Brief at 5, 9, 12, 14, 32, 37. The trial court specifically found that the plaintiff had failed to meet her burden of proof on this issue. (R. 504).

The plaintiff further states on several occasions that the defendant was "entitled" to receive the ranch at the time the parties were divorced. Plaintiff's Brief at 5. However, it is clear from the record that the defendant did not obtain title to the property by inheritance from his mother until after the date of trial.

The plaintiff also cites to the defendant's purchase of a ring for his current wife and his failure to sell the parties Corvette as possible further rationales for the court's inequitable award of the marital estate in this case. Plaintiff's Brief at 11, 14, 32. These items were not stated by the trial court as factors in its award of property. The lower court did not order the Corvette to be sold at trial as stated in Plaintiff's brief. Plaintiff's Brief at 11, R. 511.

Other irrelevant items, testified to by the plaintiff, but not found by the trial court as a basis for its decision, were cited by the plaintiff, such as the alleged fact that the defendant was upset at the plaintiff for working, the fact that the plaintiff objected to the Arma-Coating business, and the fact that plaintiff was not aware that the defendant was going to cash in his retirement account. Plaintiff's Brief at 7, 9, 10.

The plaintiff states that "Defendant agreed that [plaintiff] could use the income tax refund" to purchase the condominium. Plaintiff's Brief at 10. It is clear from the record that the Plaintiff did contract to purchase the condominium and pay the initial $500 down, in violation of the court's order restraining the parties from disposing of marital assets, without the defendant's consent or knowledge. The parties disputed whether the plaintiff permitted the defendant to put the other funds down, and the court made no finding on that issue. (R. 928-9).

The income amounts stated by the plaintiff in her brief refer to the defendant's gross income, while the income imputed by the trial court apparently refers to net income. Plaintiff's Brief at 13.

Plaintiff also refers to a document, Defendant's Proposed Findings of Fact, which was unverified, unsigned, and not part of the record on appeal. Plaintiff's Brief at 12, 31.

III. LOWER COURT'S AMENDMENT OF FINDINGS IMPROPER

Plaintiff cites Anderson v. Schwendiman, 764 p.2d 999 (Utah App. 1988), for the proposition that "Filing a motion under Rule 59

of the Utah Rules of Civil Procedure 'suspend the finality of the judgment . . .'" In Anderson, the court dismissed an appeal for lack of jurisdiction where the notice of appeal was filed prior to the trial court's ruling on a Rule 59(e) motion. The issue was whether the appellate court had jurisdiction, not whether the trial court had the authority to amend the findings in the case. The issue in the present matter is not whether the judgment was final, but whether it was entered.

Rule 58A(c) of the Utah Rules of Civil Procedure states that "A judgment is *complete* and shall be deemed entered *for all purposes* . . . when the same is signed and filed . . ." [emphasis added]. Here, the original judgment was entered on March 3, 1997, before the trial court entered its amended findings.

The Plaintiff, in his brief, then goes on to argue that "Pending entry of a final Judgement, the trial court has authority to make additional findings or alter its judgment." No citation is cited for this proposition. The Rules of Civil Procedure provide only one method for the amendment of findings, and that is by motion of the parties in Rule 52(b) of the Utah Rules of Civile Procedure. Said motion must be filed not later than 10 days after the *entry* of judgment. The judgment is considered complete when it is entered. Even if it were the case that the trial court could freely amend its findings before the entry of its judgment, the court had no authority to amend the findings as here its judgment was already entered.

The Plaintiff further states that "the trial court is

certainly not bound to merely grant or deny the relief requested in a Rule 59 Motion if it appears that additional findings may be appropriate or necessary." Again, no citation is provided. The defendant's motion to amend the findings only requested additional findings as to the status of the Mountain Meadows Ranch as marital or separate property (R. 418). It did not request additional findings regarding circumstances which required the award of a disproportionate portion of the marital estate to the plaintiff. The court denied the defendant's motion for additional findings. Plaintiff's Brief at 15. The plaintiff did not properly file a motion to amend the findings under Rule 52(b), and that is the only method provided in the Utah Rules of Civil Procedure to amend the findings.

IV. ADDITIONAL FINDINGS OF TRIAL COURT INCONSISTENT WITH PRIOR FINDINGS AND UNSUPPORTED BY EVIDENCE

In regards to the court's amended finding that the defendant's termination of his employment "deprived the Plaintiff of the benefit of his income and the benefit of his retirement account had he worked until he became entitled to full retirement benefits," it is clear from the court's own findings and judgment that the plaintiff was provided sufficient income for her needs. Plaintiff apparently argues that an increased sum of alimony would have been awarded to her had the defendant continued to work. In considering the amount of alimony to award, the court shall consider "the financial condition and needs of the recipient spouse, the recipient's earning capacity or ability to produce income, and the ability of the payor spouse to provide support." § 30-3-5(7) Utah

Code Ann. Here, the plaintiff has income of $540 per month, receives $850 in rental income from the marital home awarded to her free and clear, and $600 in alimony from the defendant. With her financial need of $2,000, she is provided income equal to her expenses and no increased amount of alimony would have been appropriate. Further, the defendant, even if he had kept his teaching position on a "regular" schedule, would not have had any greater ability to pay alimony to the plaintiff. His *gross* income would have been approximately $3,000 per month and he had monthly expenses of $2,400. Regardless of whether the defendant had continued working as a school teacher, his actions would not have "deprived the Plaintiff of the benefit of his income" as stated in the court's findings.

Whether the defendant had continued to work would have been largely irrelevant as far as any benefit received by the plaintiff for the defendant's retirement account. If the retirement benefits had been split between the parties, the defendant would have had less ability to pay alimony and the plaintiff's alimony award would have to be reduced. There was no testimony at trial as to what amount the defendant would have received from his retirement account on a monthly basis had he worked until retirement, but the net value of the account, before taxes, only three years prior to his retirement was less than $70,000. Even if the defendant were to receive income from the account in the amount of $3,000 per month, his income while working on a "regular" schedule (which at $36,000 per year would have exhausted the retirement account in

less than two years), the amount of alimony would not have changed. The size of the retirement account, which is less than 10% of the marital estate, does not justify such a disproportionate award of the marital estate.

The lower court in its amended findings found that:

> Although some of [the retirement account] funds were used to assist the Plaintiff with reference to acquisition of her condominium, most of the funds were used to pay a debt incurred in conjunction with the Defendant's opening a business against the Plaintiff's will, while the parties were still married, a[n] asset which, according to the Court's findings, now has no value. In essence, the Defendant dissipated almost all of that retirement account. Plaintiff should receive a greater balance of the marital estate (R. 509).

Again, the amount of the retirement account, which had a net pre-tax value of less than $70,000, is less than 10% of the value of the marital estate. Such a small amount is insufficient to justify the award of 97.75% of the marital estate to the plaintiff.

Further, this finding is inconsistent with the court's other findings and findings at trial. The lower court found that the funds from the retirement account were used to "refinance the Arma Coating business and also to put a substantial down payment on the Condominium which the Plaintiff is now occupying." (R. 503). The trial court acknowledged the "responsibility that [the defendant] felt he had to provide for his then ex-wife's housing needs in a manner appropriate to her standard of living." (R. 503). At trial, when counsel for the defendant sought to further expand on the issue of the liquidation of the retirement account and the defendant's efforts to preserve the funds that the plaintiff had invested in the condominium, the court stated that:

> Counsel, let me ask you about this because I — I may be missing something, but the condo had a stipulated value for purposes of this trial of $135,000. At the time that Myrlene Lytle determined to acquire that condo, she put $500 down on it, and by her own testimony, did not discuss that with Clinton Lytle. However, when the $4,500 to make the rest of the $5,000 down payment was needed, that was acquired through the tax return refund.
>
> The balance of the loan obtained by Mr. Lytle in his best efforts and that now accounts for the purchase of the condo (R. 928).

After counsel for the defendant explained why he wished to further delve into this issue, the court found that:

> And it makes perfectly good sense to me for them not to walk away from $5,000. It makes a very reasonable economic decision on Mr. Lytle's part not to lose that money when it's tied up in a tangible asset such as the condo. I do not think there's a dispute over that.
>
> *I fault neither of these parties* for having taken that effort, number one, not to lose the $5,000, and, number two, make sure that Mrs. Lytle has a reasonable dwelling that is approximating her standard of living during the marriage. It makes perfectly good sense to me, counsel, and I just don't know why we have to talk about it so much. [emphasis added] (R. 928-9).

In this matter, the plaintiff invested $500 of marital funds to purchase a condominium without the plaintiff's permission. This violated the court's order regarding the disposition of marital assets. The parties disagreed, and the court made no finding, whether the next $4,500 put down on the condo was done with the defendant's consent. It is clear from the record that the defendant did not sign the income refund tax check. (R. 929). In order to preserve those deposited funds, the defendant paid off a loan on the Arma-Coating business in order to obtain a mortgage on the condominium (R. 665, 745). At trial, the court found fault with neither of the parties for their actions.

Further, the liquidation of the retirement account did not violate a court order. The order in question, entered August 29, 1995, restrained each party "from transferring or disposing" of any property unless the other party consents. (R. 109). Although the defendant liquidated the retirement account, there is no evidence that he transferred or disposed of it without the consent of the plaintiff. The stipulation of the parties, entered into evidence, states that the defendant could use "his retirement to pay off a loan to Arma Coating and is borrowing $130,000 to complete purchase of Myrlene's new condo." (R. 595). The stipulation states that the defendant "could use" the retirements funds for that purpose, not that he had already used them.

Further, the funds used to pay the Arma-Coating business debt were not dissipated. The debt was paid in order for the defendant to obtain a loan to purchase the condominium. Arma-Coating was a marital asset and the debts thereon were marital debts. Although the business was found by the lower court to have a net value of $0, if the debts had not been paid it would have had a negative net value. Thus the funds from the retirement account were used to pay a marital debt, and regardless of whether the funds were used for that purpose the net value of the marital estate would have remained the same.

In regards to the court's finding that the plaintiff "is clearly unable to support herself at the standard of living to which she is entitled with the amount of alimony awarded by the Court and her own earned income," and that she "still falls

approximately $900 short each month of being able to meet her financial needs," this finding ignores the fact the plaintiff receives $850 in income from the rental of the marital home, which she was awarded free and clear. The court included this factor in its award of alimony in paragraph 41 of its findings, and also found that "Plaintiff also has the building lot which is probably worth something that she could sell and live off of for quite a while and maybe not even have to work for a period of time. . . ." (R. 508).

The lower court's finding that "technically, the Plaintiff may not have acquired a financial interest in the Mountain Meadows Ranch because of work she performed on that property during the parties marriage and while it was still titled in the name of the Defendant's parents, her contribution toward that asset ought to be considered and supports the Court's ultimate award of marital property", is unsupported by the evidence and contrary to Utah law. Any contribution made towards the ranch was made while it was owned by someone else. As the plaintiff can not claim any legal interest in the ranch, she seeks to be awarded an equitable interest. There is no Utah case or statute under which an equitable interest in the property could be awarded to the plaintiff. There is no evidence at trial that the defendant or his parents intended such an interest to be awarded to the plaintiff. Nor is there any evidence that the plaintiff's contribution in any way enhanced the value of ranch or increased the chance that the defendant would inherit it.

Further, the plaintiff's contribution towards that asset was

minimal. From the plaintiff's testimony, it appears that she may have assisted in harvesting gardens, canning, and feeding the cows briefly when the defendant was ill with a heart condition. She also rode on the back of a tractor while the defendant worked. Most of her testimony on this issue is in regards to the defendant's efforts on the ranch, rather than her own. The transcript of the plaintiff's testimony in this regard is attached in the addendum to this brief. (R. 706-9). Such contributions are insufficient to provide for such an inequitable distribution of the parties's estate, especially when considering that the plaintiff's parents, by inter vivos gift, transferred to the parties 40 acres of real estate with a current value of $1,500,000. This fully compensated the plaintiff for any "contribution" made to the ranch.

The plaintiff, in her brief, misconstrues the holding of Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988). There, the parties at trial requested that the lower court provide them with guidance by deciding whether certain shares of stock, donated to the husband, should be considered in their settlement negotiations. The court ruled that the stock "is property of the marriage and should be taken into consideration by the court in dividing all marital property on a fair and equitable basis." Mortensen, 760 P.2d at 305. The parties later stipulated that the husband should receive the shares of stock, but only one-third of the marital estate.

The husband appealed the trial court's ruling regarding the stock. The Supreme Court stated that a two-thirds award to the

Defendant may not have been inequitable based upon (1) the superior education and income of the husband, (2) the fact that three minor children of the parties lived at home, (3) the wife waived her right to alimony, (4) the wife's agreement to a reduced amount of child support, and (5) the fact that the husband was awarded his entire retirement account.

Those factors relevant to Mortensen are not present in the instant matter. The defendant had only three years until full retirement, at which time his superior education would not have yielded a superior income. There were no minor children of the parties and the plaintiff sought, and received, an award of alimony. Further, the retirement account in this case was used for the mutual benefit of the parties and was exhausted before trial.

The court in Mortensen found that "In view of these factors, it would not have inequitable for the trial court to award plaintiff two-thirds of the remaining property and defendant one-third, *giving no weight at all to the fact that he received his shares of stock*." [emphasis added] Mortensen, 760 P.2d at 309. The court thus did not consider the separate property as justification for the disproportionate award. This comports with the courts discussion of gifted or inherited property, quoted here at length as a concise summary of pertinent Utah law on the issue:

> We conclude that in Utah, trial courts making "equitable" property division pursuant to Section 30-3-5 should, in accordance with the rule prevailing in most other jurisdictions and with the division made in many of our own cases, generally award property acquired by one spouse by gift and inheritance during the marriage . . . to that spouse, together with any appreciation or enhancement of its value, unless (1) the other spouse has by his or her own efforts or

> expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it, Dubois v. Dubois, supra, or (2) the property has been consumed or its identify lost through commingling or exchanges or where the acquiring spouse has made a gift of an interest therein to the other spouse. Cf. Jesperson v. Jesperson, 610 P.2d 326 (Utah 1980). An exception to this rule would be where part or all of the gift or inheritance is awarded to the nondonee or nonheir spouse in lieu of alimony as was done in Weaver v. Weaver, supra. The remaining property should be divided equitably between the parties as in other divorce cases, but not necessarily with strict mathematical equality. Teece v. Teece, 715 P.2d 106 (Utah 1986). However, *in making that division, the donee or heir spouse should not lose the benefit of his or her gift or inheritance by the trial court's automatically or arbitrarily awarding the other spouse an equal amount of the remaining property which was acquired by their joint efforts to offset the gifts or inheritance.* [emphasis added]

Mortensen, 760 P.2d at 308. In her brief, the plaintiff, without citing authority, states that "Clearly, a trial court should consider a party's separate property in fashioning its equitable award of marital property." (Respondent's Brief, 28). This is directly contrary to the directions to trial courts given above.

The court in Mortensen went on to discuss those factors that could result in such a disproportionate award: eliminating the need for alimony or support for the nondonee spouse and to provide housing for the children. Neither of these factors is present in the instant matter.

These rules, states the court, "preserve and give effect to the right that married persons have always had in this state to separately own and enjoy property" and "accords with the normal intent of donors or deceased persons that their gifts and inheritances be kept within their family and succession should not be diverted because of divorce." Mortensen, 760 P.2d at 308-9.

The defendant's rights in this case and the intentions of his parents have been foiled by the trial court.

Plaintiff notes that Mortensen cites to Weaver v. Weaver, 442 P.2d 928 (Utah 1968), and others, as cases where the court approved of a disproportionate award of the marital estate. In Weaver, the parties had accumulated assets of $750,000. The court awarded one-half of the estate to each party. The plaintiff in that case was completely disabled and the she was not awarded alimony. The defendant claimed that $500,000 of the total estate should not have been equitably divided, as a "considerable portion" of those assets had been acquired by purchase and gift from his father and sister. It is not clear where the remainder of the fund associated with the $500,000 came from. After reviewing the record, the court could not say that the trial court did not abuse its discretion, and was inclined to the view that the record supported the findings and conclusions of the court below. The court made no finding that the $500,000 was not part of the marital estate as claimed by the defendant. Weaver is thus not a case of an inequitable distribution as claimed by the plaintiff. Factually, the present case is dissimilar as the plaintiff here is not disabled and was awarded alimony.

The plaintiff in her brief states that "The trial court did not divide the parties' marital estate based on a strict mathematical formula and is not required to do so." For this proposition, plaintiff cites Teece v. Teece, 715 P.2d 106 (Utah 1986). In that case, the defendant argued that his share of the

down-payment in a home, which totaled $6,500, came from a pre-marital asset. The trial court divided the equity in the home equally. The defendant claimed that he should have been reimbursed for his premarital contribution before dividing the equity. The Supreme Court found conflicting evidence as to whether the down payment was from premarital funds, but found that:

> even if we accept as true the defendant's testimony as the source of the $6,500 contribution, the difference in the contributions made by the two parties was no so great as to give rise to any abuse of discretion of the trial court. Mathematical equality in the division of each marital property is not required.

Teece v. Teece, 715 P.2d at 107. The court in Teece was not approving of a radical and disproportionate distribution of the marital estate. In that case, the amount of money in dispute was minor, and the court held that the equitable distribution did not have be a strictly mathematical 50/50 split. Here, the value of the estate awarded to the plaintiff above her one-half share is more than $300,000. The language in Teece was not intended to be, and has not been, used to uphold such a inequitable distributions. "Mathematical equality" may not be required, but Teece does not remove the requirement of equality itself in the distribution of assets.

V. ABUSE OF DISCRETION FOR TRIAL COURT TO CONSIDER RANCH

In fashioning an equitable award of property, the factors generally to be considered by trial courts are:

> the amount and kind of property to be divided; whether the property was acquired before or during the marriage; the source of the property; the health of the parties; the parties' standard of living, respective financial conditions, needs, and earning capacity; the duration of the marriage; the

> children of the marriage; the parties' ages at time of marriage and of divorce; what the parties gave up by the marriage; and the necessary relationship the property division has with the amount of alimony and child support to be awarded.

Burke v. Burke, 733 P.2d 133, 135 (Utah 1987). In relation to the above factors, there is a substantial estate in this case, the marital estate was acquired during the marriage, the entire net value of the marital estate was acquired by inter vivos gift from the defendant's parents, both parties are in adequate health but are nearing retirement age, and the defendant may have some financial need which is remedied by the courts award of alimony. None of these factors supports a disproportionate award. These factors to be considered by trial courts do specifically not include the presence of an equitable interest in inherited property.

VI. PROPERTY AWARD DID NOT ACHIEVE FAIR, JUST EQUITABLE RESULT

The plaintiff claims that the property distribution in this case achieves a fair, just, and equitable result and cites Finlayson v. Finlayson, 874 P.2d 843 (Utah App. 1994), which in turn cited Dunn v. Dunn, 802 P.2d 843 (Utah App. 1990). Neither of these cases deals with the "fair, just and equitable" exception to the general rule that each party in should receive the real and personal property he or she inherited during the marriage. Mortensen, 760 P.2d at 306; Preston v. Preston, 646 P.2d 705, 706 (Utah 1982). In Finlayson, there was a dispute regarding whether a certain debt was a gift or a loan from one of the parties' parents. There was not any dispute whether any separate property justified a

disproportionate award of the marital estate. In Dunn, the trial court allowed the defendant a credit for separate property which was later consumed and commingled. The appellate court properly held that this was improper. This clearly has no application to the present matter, as the defendant did not acquire the ranch until after the parties divorce and had no opportunity to consume or otherwise lose the ranch's identity through commingling or exchanges. That is essentially a question of whether the ranch is separate or marital property, and the Plaintiff has here conceded that the ranch is separate property. Defendant's Brief, 5, 13.

The trial court in Dunn also awarded 76% of the marital estate to the defendant and 24% to the plaintiff. That award, as in the present case, was based upon a factor not included in Burke, supra. Although the award in Dunn is less inequitable than in the present case, the decision was remanded and the trial court instructed to:

> first properly categorize the parties' property as part of the marital estate or as the separate property of one of the other . . . . *Each party is then presumed to be entitled to all of his her separate property and fifty percent of the marital property.* [emphasis added]

Dunn, 802 P.2d at 1323.

The court in Dunn, when stating the "fair, just and equitable" language on which the defendant principally relies to justify the inequitable distribution in this case, cites only to Noble v. Noble, 761 P.2d 1369 (Utah 1988). In that case, the court approved of the award of the husband's separate property to the wife because the husband shot the wife in the head at close range with a rifle while she was lying on their bed. While any distribution could be

justified as "fair, just and equitable," examination of the reasoning behind that standard, evidenced in Noble, leaves no doubt that such a rationale is inapplicable to this case.

In Burt v. Burt, 799 P.2d 1166 (Utah App. 1990), the trial court awarded a disproportionate portion of the marital estate to the plaintiff, apparently due to the fact that the defendant had substantial inherited property. The appellate court held that the same was improper without additional findings and remanded the case to the district court. The plaintiff cites from Burt language that the court may award an interest in inherited property to the non-heir spouse in "other extraordinary situations where equity so demands." citing Mortensen, 760 P.2d at 308. Note that the extraordinary situation is one which equity "demands" such a result. Mortensen provides that:

> The fact that one spouse has inherited or donated property, particulary if it is income producing, may be properly be considered as eliminating or reducing the need for alimony by that spouse or as a source of income for the payment of child support or alimony (where awarded) by that spouse. Such property might also be utilized to provide housing for minor children in other utilized in other extraordinary situations where equity so demands.

Id. Justice Zimmerman, in his concurring opinion, stated that

> The overarching general rule remains the same in any divorce case: to provide adequate support for the children of the marriage, Race v. Race, 740 P.2d 253, 256 (Utah 1987), and to divide the economic assets and income stream of the parties so as to permit both to maintain themselves after the marriage as nearly as possible at the standard of living enjoyed during the marriage. See eg. Noble v. Noble, 761 P.2d 1369, 1373 (Utah 1988).

Mortensen, 760 P.2d at 310. The other "extraordinary situations" described in the Mortensen opinion all deal with alimony and minor

children. This is in accord with Justice Zimmerman's concurrence. However, in this case there are no minor children of the parties. Further, the defendant is awarded a home and substantial other assets, all debt free, to maintain her at her standard of living during the marriage.

Justice Zimmerman's concurrence cited Noble v. Noble, 761 P.2d 1369, 1373 (Utah 1988) as an example of where equity demanded that the separate property of one party be awarded to the other spouse. Noble, the case where the husband disabled the wife by shooting her in the head with a rifle, was cited above as the root of the "fair, just and equitable" language found in Dunn v. Dunn, 802 P.2d 843 (Utah App. 1990).

The court's finding that the plaintiff's contributions to the ranch equitably requires that she be awarded the entire marital estate is fundamentally only an argument that the ranch should be included in the marital estate. Her efforts prior to the ranch being deeded to the defendant are irrelevant. If she had performed these actions and the defendant had not received the ranch from his parents, would she then claim that she should receive 97.75% of the marital estate? The key factor in the court's decision is therefore not whether the plaintiff contributed to the ranch, but whether the defendant received it, and that is impermissible under Mortensen.

VII. LOWER COURT DID NOT HAVE JURISDICTION OVER RANCH

The plaintiff correctly states the rule regarding whether the trial court has jurisdiction over property: was it "any right that

has accrued during the marriage to a present or future benefit." Jefferies v. Jefferies, 895 P.2d 835 (Utah Ct. App. 1995). From the record it is apparent that defendant did not obtain title to the ranch until 1997, after the parties divorce. The defective deed from his parents estate was not even recorded until February of 1995, a month after the parties separation. Any right he had to any present or future benefit did not accrue until after the marriage. Plaintiff notes in her brief that his interest in the ranch was not "technically a present benefit." Plaintiff's Brief, 35-6. However, as the defendant did not have good title to the property at the time of divorce, the future benefit did not "accrue," as a legally enforceable claim, until after the marriage. Plaintiff, in her brief, quotes the defendant's testimony at trial that it was his "understanding that [he] *would* receive" the ranch. [emphasis added] (R. 651, 652). This again confirms that the defendant would, at some future time, accrue some present or future benefit, but that he had not received the same at the time of trial.

For marital assets to be distributed, the assets must be in the possession of one, or both, of the marital parties. Endrody v. Endrody, 914 P.2d 1166, 1169 (Utah App. 1996). The court in Endrody stated that "While possession usually connotes physical possession, we believe it also connotes legal possession." Id. At the time of trial in this matter, the defendant did not have rightful legal possession of the ranch and the same could not be awarded or considered by the trial court.

VIII. ALIMONY AWARD INAPPROPRIATE IN THIS ACTION

The defendant does not have the ability to pay alimony, and the plaintiff is awarded sufficient property to meet her needs. Even if she were only awarded one-half of the parties' estate, she would receive a home and $200,000 of other property debt-free. Under the trial court's inequitable property division, she receives over $650,000 of property, again without encumbrance. All of the property was derivative of inter-vivos gifts from the defendant's parents. In these circumstances, alimony is inappropriate. See Dubois v. Dubois, 504 P.2d 1380 (Utah 1973).

The plaintiff asserts that the trial court did not mention that the defendant was remarried and his spouse contributes toward the payment of his living expenses. Plaintiff's Brief at 36. However, the defendant, in his testimony at trial included this factor in the calculation of his living expenses. R. 943. Again, counsel for the plaintiff is seeking to introduce a factor into the court's decision which is simply not present.

IX. IMPUTATION OF INCOME IMPROPER

The trial court failed to make any specific finding that the defendant was unemployed or underemployed in ordered to impute income. Section 78-45-7 of the Utah Code requires that "income may not be imputed to a parent unless the parent stipulates to the amount of imputed income or a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed." In Hall v. Hall, 858 P.2d 1018 (Utah App. 1993), this standard was applied to imputation of income for both child support and alimony

purposes. The plaintiff quotes Hall to the extent that § 78-45-7(a) "does not specifically require a 'finding' of underemployment, to parrot the exact language of the statute," without quoting the remainder of that sentence, which reads "it is well established that where a statute expressly requires a trial court to make a threshold finding before taking specified judicial action, the trial court abuses its discretion if it proceeds without first making the legislatively mandated finding." 858 P.2d at 1024.

The findings of the trial court "do not become relevant until after it determines, as a threshold matter, that income should be imputed because the parent is voluntarily unemployed or underemployed as required by" statute. Hall, 1018 P.2d at 1024.

Absent such a specific finding, the trial court may be affirmed only if the undisputed evidence clearly establishes the factor or factors on which findings are missing or if the statutorily mandated findings are implied. Hall, 858 P.2d 1018. Here, however, at the time of trial Defendant was 60 years old (R. 713, 714). The principal at Defendant's former school testified that it was unusual for someone to still be teaching at age 60 (R. 717).

The court found that the Defendant "is working hard to make [the marital business] profitable. . . ." (R. 505). The Defendant worked more than forty hours per week for the business after he stopped teaching, but did not receive a salary (R. 678, 743). The trial court found that "Defendant is working more than full-time at the two businesses, the Boat Shop, now known as High Desert Marine,

and the Arma-Coating business, and is making a good faith and genuine effort to produce income at the same or hopefully even above the levels that he enjoyed while he was teaching." (R. 504). Further reasons given by the defendant for his not resuming his teaching position are given in the addendum attached hereto. (R. 706-7).

With these findings and evidence, the undisputed evidence does not clearly establish the factor or factors on which findings are missing or that the statutorily mandated findings are implied.

CONCLUSION

The lower court in this case did not have the power to amend the findings after the judgment had already been entered. Those additional findings are unsupported by the evidence and contrary to the courts prior findings. The plaintiff was awarded property and alimony sufficient to meet her needs as found by the trial court. Defendant's retirement account was utilized for the benefit of the parties and with the stipulation of the plaintiff. At trial, the court did not fault the defendant for the liquidation of the account and found his actions to save the money the plaintiff had deposited on the condominium, against court order, to be reasonable. In any case, the retirement account, which was worth less than 10% of the marital estate is not sufficient grounds to make the inequitable distribution of the parties assets in this case.

The trial court included the value of the ranch inherited by the defendant from his parents in distributing the marital estate.

Consequently, the defendant received 2.25% of the substantial marital estate, which consisted almost entirely of assets derived from an inter vivos gift of 40 acres of property from defendant's parents. This gift from the defendant's parents would be worth over $1,500,000 in current property values. The trial court awarded essentially the entire net value of the martial estate, all of which is derived from gifts from the defendants parents, to the plaintiff. The defendant, after paying the debts of the parties, is left with a ranch which has been in his family for several generation but produces no income. This offset by the trial court deprives the defendant, Clint Lytle, of the benefit of his inheritance and foils the testamentary intent of his parents, Ezra and Mae Lytle.

If there are facts that could justify such a result, they are not present in this case. Instances where courts have acted to award separate property to the nondonee or nonheir spouse have always included an element of support for children or support for a spouse that is unable to support him or herself. Here, there are no minor children and the plaintiff, even if she were to only receive 50% of the marital estate, has property sufficient property to meet her needs.

Although trial courts do not have to divide the marital estate with strict mathematical equality, equality is still required. The court's distribution of the marital estate in this matter is not equitable as required by § 30-3-5 of the Utah Code. The root of equitable is that the distribution be equal. The property

distribution in this case should be reversed and the marital estate equitably divided as provided in the Defendant's Brief.

There was no finding by the trial court that the defendant was voluntarily unemployed or underemployed. In any case, it was inappropriate for the trial court to award alimony here as the plaintiff was provided with property sufficient to meet her financial needs. For these reasons, the award of alimony should be reversed.

DATED this 20th day of October, 1997.

SAMUEL G. DRAPER, FOR
HUGHES & READ

CERTIFICATE OF SERVICE

I, Samuel G. Draper, certify that on October 20, 1997 I served a copy of the attached Brief upon G. Michael Westfall, the counsel for the appellee in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

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Samuel G. Draper

Q. -- Mountain Meadows property?

A. We always helped out. We had to take care of the cattle, and Clint loved to work the ground and to plow. And he didn't like the hay, hauling of the hay. It was hard, but I rode with him on the tractors day after day and worked with him, but he -- we did everything.

We worked around his working time and stuff, but his -- his dad and mom were getting old and they were having a really hard time being able to do it. His dad had had a hip -- something wrong with his hip from the time he was a boy, and it was getting worse, and it was harder for him to walk. And so the kids and I were all the help that Clint had, and we worked at the ranch.

Q. The kids and I, your children?

A. Yes, my children.

Q. Did Clint's parents live at the ranch?

A. Yes, they lived there in the summers. In the winter they moved downtown because it was too cold for them.

Q. And you indicate that -- that Clint helped out with the plowing --

A. Yes.

Q. -- things like that? Did you also

personally help out in terms of operating and maintaining the ranch?

A. Yes. Yes.

Q. What did you do?

A. I learned to drive the tractor, this little red tractor, and I remember we were down in the fields and Clint was showing me how. And I remember that he got a little bit upset with me. When he got back to the house his dad told him or his mother, one of them, told him to be patient with me, I'd never driven a tractor before, but I did learn to drive a tractor. And I did follow him when he was disking and I would do the planting. And I would drive while we were loading the hay, and I've even hauled a truck and trailer to town with hay on it. And I just worked right along with him.

Q. Okay. And this was primarily during the summer months?

A. Yes. Uh-huh. We had to move the cows twice a year from the summer division to the winter -- (inaudible) -- and one year we rode horses and it was a three-day drive. And other times we loaded them in the truck and brought them back and then took them out, and I was always with Clint, always.

Q. Okay. And was this work primarily done on weekends or was it done during the week?

A. It was done on weekends and after school when he was teaching and then on every weekend we were up there working. It had -- it had to be done. Shawn was helping lift the hay. And they also put in big gardens, and we had to harvest those gardens. And I know that we'd go up and work all day and go home at night, and I'd take something home that I'd have to be up all night canning and then come up the next morning and --

Q. So the canning you would take all the way back to St. George to take care of?

A. Yes.

Q. Okay. Did -- would Clint stay overnight up at the ranch or did you pretty much the family would come back, go home?

A. Well, in the summertime we pretty much stayed up there, and in the wintertime we -- when he had to be to school the next morning, we would go back and forth.

Q. So during the summer times, did the whole family -- did you actually live up there on the Mountain Meadows property?

A. Yeah, pretty much kind of, especially when

we were in California. We'd come up during the summer vacation, and we would just be working up there. And we just stayed up there.

Q. So how long did this go on with you helping out to maintain and to operate the farming, ranching operations out on the Mountain Meadows property?

A. It went on until Clint moved out in '95, and I helped. I helped with the cows. When he was ill with his heart surgery and his shoulder surgery and those other things, no one was around to feed the cows, and so I'd have to back the big trailer -- I'd drive the tractor, but I'd back the big trailer up to the hay stack and try to roll the bails off on to the trailer because they were too heavy for me to lift. And then I'd drive the tractor up and feed the cows and come back down. And I did this for quite awhile while he was sick to help out.

Q. Okay.

A. I loved to go up and ride the tractor with him. We'd go up at night in his -- the new big tractor that was enclosed in and we'd ride in that and bail hay.

Q. There was a portions of the Dixie Downs property, the original 40 acres that have been sold

factor.

Q. Okay. Have alimony expenses been paid out of the boat shop, the alimony that you have paid to Ms. Lytle?

A. The sources that have come for a lot of the alimony and the items that have paid off have come a lot of it from Arma Coating, and then in one of the times -- you know, we talked about, you know, that times were rougher -- (inaudible) -- about paying things off. I run up $12,000 on credit cards so that these things wouldn't be late.

Q. The alimony?

A. Pardon?

Q. The alimony?

A. So the alimony, the house payments, and they've still been late, but I have run up an extra 12,000 trying to keep up and it's been -- it hasn't been all roses.

Q. Okay. Mr. Lytle, we're going -- we're going to touch on alimony next. Why have you not resumed your position as a teacher?

A. I think there's several reasons. The last -- the last few years have been extremely strenuous. Both my parents died, the items with my sisters was extremely difficult. I've been on

extended.

Now, to some people that's not a lot, but it's very -- it keeps you very, very busy. I've run the ranch. I've worked the boat shop. So the hours in the day have been very long, and it reached a point where I was having a hard time keeping up with all of my commitments.

As I talked to the superintendent, and those are the people that know me, know that I'm committed to schools, and I have always said whether age or whether sickness or whatever it might be, if the day comes when I can't give 100 percent to my kids, I'm not going to be there, and I wasn't.

It's been extremely difficult listening to the crap that I've had to put up with the teachers talking about, oh, yeah, he's been doing this, he's been doing that, the conversations from school to school. It has not been an easy situation. If I were a parent, I would say, do I want my kid in that class?

Although I know what my moral standards are and so does my stake president, I could not say to a parent, hey, this is the way it should be. You need to leave your kid here. I felt that would be difficult because I did not feel I could give 110